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Supreme Court, U.S.

No. _____ 98 813 NOV 16 1998

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In The

Supreme Court of the United States

October Term, 1998

PAUL LIR ALEXANDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. The United States Court of Appeals for the Eleventh Circuit has rendered a decision that is in conflict with the decisions of the United States Supreme Court and other United States Court of Appeals decisions, and has departed from the accepted and usual course of judicial proceedings, thereby calling for the exercise of the Supreme Court's supervisory power.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Eleventh Circuit:

1. **PAUL LIR ALEXANDER**, *Defendant/Appellant/Petitioner;*

2. **UNITED STATES OF AMERICA**, *Plaintiff/Appellee/Respondent.*

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As to the denial of Petitioners Motion to Compel the Government to File a Rule 35 Motion, there are no other reports or opinions, other than the Eleventh Circuit Opinion and District Court's Order, which can be found in the Appendix, beginning at A1.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Given the Judgement of the United States Court of Appeals for the Eleventh Circuit, dated and entered on August 18, 1998, and the subsequent Mandate, issued September 16, 1998, the jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. §1254(1).

The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part, Rule 35 of the Federal Rules of Criminal Procedure sets forth the following:

> *"(b) **Reduction of Sentence for Changed Circumstances**. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. . . .."*

As to the government's discretion when exercising its power to file a motion for a defendant's substantial assistance, the "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive" or "was not rationally related to any legitimate

Government end." ***Wade v. United States***, 504 U.S. 181, 185-86, 112 S.Ct. 1840, 1843-44, 118 L.Ed.2d 524 (1992).

STATEMENT OF THE CASE

Petitioner was arrested in April of 1993, and subsequently charged with a conspiracy to import cocaine, in violation of 21 U.S.C. § 963.

Immediately following his arrest, Petitioner sought a cooperation agreement with the government. On April 22, 1993, Petitioner was interviewed by the authorities for the purpose of having the government assess the proffer and determine whether a cooperation agreement would be offered.

Subsequently, the government set forth a skeletal plea offer, in letter form, which informed Petitioner that any plea agreement offered would not contain language alluding to possible Section 5K1.1 or Rule 35 motions. Specifically, the letter stated that the government "does not at present contemplate entering into any agreement with [Petitioner] which could provide for such relief". As such, the letter was silent as to any future availability of a cooperation agreement.

Petitioner's counsel acknowledged the potential terms of said agreement in a response dated the same day. As the government was not prepared to discuss cooperation until Petitioner had pleaded guilty, counsel

inquired into the future availability of a cooperation agreement, along with asking for the policy which the government would adopt surrounding the cooperation.

On June 9, 1993, the government responded to Petitioner's request for clarification as to a cooperation provision in the agreement. The government reiterated its prior position that it "presently does not contemplate entering into any type of cooperation agreement with [Petitioner] as part of his plea in the above mentioned case or otherwise". However, the government did state that it would "not foreclose any potential for a strictly confined and closely monitored cooperation agreement in the future assuming a federal law enforcement agency is so inclined to present the necessity of such an agreement to this office". While the correspondence was not guaranteeing anything, it was construed as a commitment by the government that, if Appellant rendered substantial assistance, then the government would consider his eligibility for downward departure, as that was the "existing policy" within the U.S. Attorney's Office.

Before entering the plea, Petitioner contacted various law enforcement agencies as to the possibility of cooperating, with the government's consent, in the future. As Petitioner was precluded from offering assistance in any narcotics-related cases, he made contact with the United States Marshal's Service. According to Petitioner, he received assurances that he would be able to cooperate under the plea offer made by the United States on June 9th, and before he pleaded

guilty on July 1, 1993. In fact, the cooperation was said to have been consented to by the prosecutor. With that in mind, counsel was advised to finalize the plea arrangements.

Throughout the negotiations, the government contended that Petitioner had amassed substantial assets from illegal activity. The government demanded that Petitioner plead guilty to an information which contained a money judgment within a forfeiture count. Petitioner continually advised the government that he had no hidden money, and that all of his propitious assets were held outside the United States, more specifically all his assets were located in the Republic of Brazil, and the Brazilian Federal Authorities had seized all his assets. As the government wanted assets from Petitioner, but had no jurisdiction, and Petitioner agreed to forfeit his assets, which were not as substantial as alleged, it was agreed that the government would obtain a $5,000,000 judgment against Petitioner, to be satisfied if tangible and real estate assets became available, or if foreign bank accounts were ever located. Petitioner understood that this agreement was not a promise to pay, but simply an acknowledgment that the government would have first priority over any unfrozen or unseized assets.

On July 1, 1993, Petitioner pleaded guilty, pursuant to a written agreement. While paragraph 11 of said agreement stated that there were no other agreements or understandings between the parties that were not contained in the written plea agreement, and the plea

agreement did not set forth the government's position regarding any future cooperation, Petitioner believed that, based on the letters from the government, his plea agreement allowed him to provide information and substantial assistance to the government for consideration pursuant to U.S.S.G. §5K1.1 and/or Rule 35 (b) of the Federal Rules of Criminal Procedure. As such, after pleading guilty, and prior to sentencing, Petitioner began providing information to the government. This was done with the knowledge and explicit approval of the United States Attorney's Office.

In spite of the government's limitations on his cooperation, Petitioner's cooperation up to August 23, 1993, was detailed as being that (i) he provided information leading to the arrest of Basilio Gingerouso, a class 1 felon; and (ii) he provided information leading to the capture of Alex deCubas. It was also stated that there were other matters of cooperation "on the line".

In response to the above cooperation, the government admitted that it had allowed Petitioner to provide information, but reiterated that there were no agreements in regard to relief for substantial assistance. The government went on to state that it had suspended the receipt of Petitioner's information, but at no time did the government ever notify Petitioner of such suspension. Such a position from the government was internally inconsistent. After stating that there had been no agreement between the parties to allow for cooperation, the government conceded that it was

allowing Petitioner to provide information to the Marshal's Service, and that information would be considered by government within "its practice and policy". Furthermore, the suspension mentioned by the government was short-lived, and was resolved at a meeting of counsel prior to sentencing.

Prior to Petitioner's sentencing date of October 13, 1993, he was advised by the government that no motion for a §5K1.1 reduction would be filed. During the sentencing, the district court inquired into the nature of Petitioner's cooperation. In answering such inquiries, the government stated that (i) Petitioner was providing information to the authorities; and (ii) while Petitioner was cooperating, it was not, at that time, thought by the government to be sufficient for a §5K1.1 motion. Thereby, the government implied such cooperation credit was still available.

Petitioner was sentenced to 262 months incarceration. A subsequent Order Reducing Sentence was entered by the district court, over opposition by the government, on February 8, 1996, reducing the term of incarceration to 168 months pursuant a Motion to Modify Imposed Term of Imprisonment Based Upon Retroactive Sentencing Range Reduction. This was not a reduction based on any cooperation but one of legal requirements, based on the change in Drug Tables.

Even after sentencing, Petitioner continued to provide information and render assistance to the United States Marshal's Service and other law enforcement

agencies in conformity with his perception of the plea agreement and subsequent correspondence and counsel's advice. As such, Petitioner's counsel contacted the prosecutor and inquired as to when a Rule 35(b) motion might be filed.

In a response, the government again reiterated that the plea agreement was silent as to any sentence reductions for cooperation. The government went on to state that the plea agreement expressly provided that Petitioner agreed to pay a 5 million dollar money judgement that he has not complied with. The government viewed this non-compliance as material to any good faith attempts to meet his obligations to the United States Government. The government then asserted that "[p]rior to any further discussions of cooperation by the government, we await full and good faith compliance with the terms of the plea agreement entered into by [Petitioner]. This was the first instance of notice that the government was requiring Petitioner to pay against the judgment before his cooperation would be rewarded.

With the government's position being that there would be no Rule 35 consideration until a substantial contribution was made against the forfeiture provision of the plea agreement, Petitioner agreed to do whatever was required of him to demonstrate that the funds alleged by the government did not exist. The government refused Petitioner's offer of assistance and asserted that it was investigating Petitioner's assets in

its own fashion. Appellant offered, again, to cooperate in any fashion in order to facilitate the investigation.

In spite of the government's "on-going" investigation, Petitioner continued to provide assistance to law enforcement agencies throughout 1994 and 1995. In each instance, Petitioner was approached by law enforcement officials or Assistant United States Attorneys seeking information concerning criminal activity. While the government continued to acquire the benefits from Petitioner's information, it refused to confer any benefits in return. Because these negotiations were conducted in good faith, the government did not oppose a motion, by Petitioner, to extend the time for filing a Rule 35(b) motion, which the district court granted for a period of six months.

After two years of discussions, wherein Petitioner sought to prove his insolvency and the government's continued refusals to accept his cooperation in its financial investigation, the government finally indicated that it was not prepared to recommend a Rule 35(b).

In March of 1997, Petitioner filed a Motion with the district court, seeking to compel the government to file a Rule 35 Motion, based on cooperation he had provided to the government. In said motion, Petitioner asserted that the government should be ordered to file a Rule 35(b) motion based on (i) violations of the Due Process Clause and the holding in ***Santobello v. New York***, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), in that Petitioner pleaded guilty without being

told he would not be eligible for leniency unless he paid money; (ii) violations of the Equal Protection Clause and the holding in ***Wade v. United States***, 504 U.S. 181, 112 S.Ct. 1840, 118 L.Ed.2d 524 (1992), in that Petitioner was discriminated against because he did not have sufficient wealth to become eligible for leniency; and (iii) further violation of ***Wade*** due to the government's refusal to file not being rationally related to any legitimate goal.

After receiving the government's response, and Appellant's reply, the district court held a status conference on May 19, 1997, to determine if an evidentiary hearing was warranted. The district court found that such a hearing was, in fact, warranted, and scheduled it for August of 1997.

The evidentiary hearing was held on August 4, 1997. During the course of said hearing, the government's position, regarding the five million dollars Petitioner was allegedly "required" to pay, took an abrupt change. The government did not dispute the fact that Petitioner was under no obligation to pay said amount, under the terms of the plea agreement. The government went on to state that one of the reasons for not filing the Rule 35 motion was that Petitioner was paying for the information which he provided the Marshal's Service and, if he had money for such purposes, he should have been paying on the money judgment. As the actual plea agreement was silent as to any cooperation provision, along with Petitioner paying for the information, the government asserted that there

existed no bad faith, under ***Santobello***, nor any unconstitutional motive, under ***Wade***.

After hearing Petitioner's response to the government's position, the district court stated the following:

> "...in looking at the evidence of what is in front of me, I don't find it persuasive that there was ever in fact an agreement to cooperate....They never formally entered into any type of cooperation agreement. And their written words are to the contrary. It may have been said three or four or five times to get the point across and maybe along the way Mr. Alexander is being led to believe that might be a possibility in the future. It seems to me that's all it was, a possibility in the future that they never committed to. To the extent there is a *Santobello* argument, I don't see it in the record."

That being said, the district court turned to the issue of indigency being a constitutional deprivation. Finding that this was a legal issue, the district court agreed to hear arguments. In presenting his case on the ***Wade*** issue, Petitioner called as a witness Peter Raben, his attorney up to the point of the evidentiary hearing. On direct examination, Raben, along with going over the facts referenced above, stated the following:

> "Mr. Alexander had no intention of entering a plea agreement that did not contemplate his ability to enter into a cooperation relationship with the government. And I think that is clear from the letters that are back and forth. And that when the government characterizes it as a mere proffer of information,, there was an agreement that was in effect in writing and orally which induced Mr. Alexander to plea."

At the close of this testimony, the district court delivered the findings and conclusions. First, the district court found that the plea agreement said nothing in regard to cooperation. The district court also concluded that the plea agreement did not call for the payment of five million dollars. Finally, in regard to the agreement, the district court concluded that it is critically important that the language in Paragraph 11, regarding no other agreements being considered, be enforced.

The district court then addressed the plea colloquy. The district court pointed out that Petitioner, when asked if the terms of the plea agreement with the government were as he understood them to be, answered yes. The district court found that it was entitled to rely on such an unequivocal answer. Going further, the district court went to the discussion that occurred regarding Paragraph 11, in which the letters between Petitioner and the government were brought

up. The district court found that (i) Petitioner cited no other inducements to plead guilty other than those in the plea agreement; and (ii) while two other inducements were identified at the end of the plea hearing, there was no mention of cooperation being an additional inducement.

Next, the district court went to the issue of the letters between Petitioner and the government. The district court found that there was no evidence that these letters reduced the cooperation agreement to a written document, and stated that the letters rejected cooperation and left only the possibility of cooperation in the future. The district court went on to state that "those letters would only become relevant if, in fact, there was a question as to whether the plea agreement required cooperation or whether there was some other agreement at some point in the future establishing the existence of a cooperation agreement."

Finally, as to the payment of the five million dollars, the district court found that the government was free to enter into an agreement calling for the payment in exchange for a post-plea cooperation agreement. The district court also stated that, as the government did not set such condition out in the plea agreement or cooperation agreement, the government could not be found liable for having breached something that it never entered into, regardless of whether Petitioner had the ability to pay or not.

Based on the record and testimony, the district court then denied the Motion to Compel. Petitioner filed a timely Notice of Appeal

Petitioner's appellate brief asserted that the district court erred by (i) finding that there was no cooperation agreement between the parties where it failed to consider the entire nature of the negotiations and only looked to the four corners of the agreement; and (ii) finding that the government's refusal to file the Rule 35 Motion was not constitutionally motivated and related to related to a legitimate governmental goal.

On August 18, 1998, the Eleventh Circuit Court of Appeals affirmed the district court's denial of Petitioner's Motion to Compel. In reaching its decision, the Eleventh Circuit stated two basic reasons for the denial, to wit: (i) since the Motion to Compel was filed some two years after the expiration of the time frames set out under Rule 35(b), the district court did not err in denying the Motion; and (ii) agreeing with the position of the district court, as set out on pages 100-108 of the transcripts of the Evidentiary Hearing [See Appendix].

The Eleventh Circuit added three additional observations for the denial, to wit: (i) Petitioner was not entitled to Rule 35 consideration, as the plea agreement failed to provide any such promise; (ii) Petitioner agreed to a five million dollar forfeiture, but put his funds towards the cooperation; and (iii) given that Petitioner imported 1,845 kilograms of cocaine, he was fortunate to get a sentence of only 168 months.

Neither a Petition for Rehearing, nor Rehearing En Banc, were filed after the Eleventh Circuit's decision.

ARGUMENT

A. The United States Court of Appeals for the Eleventh Circuit has rendered a decision that is in conflict with the decisions of the United States Supreme Court and other United States Court of Appeals decisions, and has departed from the accepted and usual course of judicial proceedings, thereby calling for the exercise of the Supreme Court's supervisory power.

Petitioner first asserts that the Eleventh Circuit erred, as did the district court, by failing to consider the overall plea negotiations when deciding whether future cooperation was part of the inducement for Petitioner to enter into the plea.

Such a position was contrary to the Eleventh Circuit's decision in ***United States v. Jefferies***, 908 F.2d 1520 (11th Cir. 1990), where it was stated that a 'hyper-technical reading of the written agreement' and 'a rigidly literal approach in the construction of language' should not be accepted. Instead, the written agreement should be viewed against the back drop of the negotiations and should not be interpreted to directly contradict an oral understanding. A plea agreement that is ambiguous 'must be read against the

government.' The rationale for this method of interpretation is that a plea agreement must be construed in light of the fact that it constitutes a waiver of 'substantial constitutional rights' requiring that the defendant be adequately warned of the consequences of the plea. ***Jefferies***, 908 at 1523 (internal citations omitted).

The Eleventh Circuit's findings were also contrary to the Fifth Circuit case of ***United States v. Melton***, 930 F.2d 1096 (5th Cir. 1991). There, while the actual plea agreement was silent as to the cooperation provisions, the transmittal letter from the government provided for departure considerations for substantial assistance. After the defendant cooperated, the government declined to move for the departure at sentencing, apparently for the reason that the cooperation was not expressly written into the actual plea agreement. In remanding the case, the Fifth Circuit stated that "[t]his matter turns on the legal significance we give to the AUSA's transmittal letter. The government suggests that we should ignore it, that we should look no further than the four corners of the plea agreement. Under the factual circumstances of this case we decline that invitation to judicial myopia." ***Melton***, 930 F.2d at 1098.

In Petitioner's case, such a myopic position was taken by both the district and appellate courts. While the actual plea agreement was silent as to any cooperation agreement, the letters between the government and Appellant precluded only "present"

cooperation consideration, but did not foreclose such consideration in the future. In refusing to consider the letters as part of the plea agreement, the district court stated that "those letters would only become relevant if, in fact, there was a question as to whether the plea agreement required cooperation or whether there was some other agreement at some point in the future establishing the existence of a cooperation agreement". Given the facts and circumstance of this case, along with actions and admissions of the government, there did exist "some other agreement at some point in the future" which directly related to the language of the pre-plea letters.

By its clear language, Rule 35(b) was designed to recognize and reward cooperation subsequent to the sentencing. Clearly, the cooperation referenced in the letters dealt with "future" cooperation, and was reasonably understood to be considered under Rule 35. Pursuant to what was understood, it is indisputable that Petitioner provided his cooperation, both prior to sentencing and after. As such, existed a contractual "meeting of the minds" regarding this cooperation, whether actual or implied, through the government's continuing practice of authorizing contact between Petitioner and those seeking his assistance, along with the admissions of the government that (i) after the plea Appellant requested assistance and the government accepted his request; and (ii) there existed an agreement between the government and Petitioner that he could "come in and give us any information" he wanted.

The lower courts have read too narrowly the relationship between the implied Rule 35 contract and the written plea contract. All of the cooperation provided relates directly back to the pre-plea letters, thus making them highly relevant to the overall nature of the plea agreement. As there was talk of future cooperation being considered, and future cooperation provided to the government by and through its authorization, there can be little doubt that, under any objectively reasonable interpretation, the government and Appellant had a cooperation agreement, warranting the government to live up to its obligations.

The expectations of Petitioner, based upon the written and oral negotiations, along with the subsequent governmental actions, are what must be considered by this Court. Given the holdings of ***Jefferies*** and ***Melton***, the letters should not have been ignored when determining the overall aspect of the written agreement. As such, given the above arguments, Petitioner respectfully submits that the lower courts erred in finding no existence of a separate cooperation agreement that related back to the decision to plead guilty and the written plea.

Petitioner also submits that the Eleventh Circuit erred by finding no breach of agreement. As set out in ***Santobello v. New York***, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the

inducement or consideration, such promise must be fulfilled." ***Santobello***, 404 U.S. at 262.

As stated by the Fifth Circuit, "[t]he interest of justice and standards of good faith in negotiating plea bargains require reversal when a plea bargain is breached. A lesser standard would permit the government to make a plea bargain attractive to a defendant, subsequently violate the agreement and then argue harmless error, thereby defrauding the defendant. ***United States v. Valencia***, 985 F.2d 758, 761 (5th Cir. 1993) (citation omitted).

As set out above, the government advised Petitioner that it would allow him to provide information, in a "strictly confined and closely monitored cooperation agreement in the future assuming a federal law enforcement agency is so inclined to present the necessity of such agreement to this office." While the government cautioned that this was not a promise, there was the assurance that the "existing policy" within that office would be applicable to Petitioner's cooperation. It is submitted that such policy was/is that, if substantial assistance is provided, it is considered and rewarded. The moment this letter was written, the government was adding terms to, or a condition precedent to, any plea agreement.

Petitioner was not pleading guilty in order to serve over twenty-one years in jail. Rather, he was pleading guilty as a demonstration of good faith, in order to acquire the privilege from the government to render

substantial assistance in return for mitigation of his sentence. Petitioner was never advised, prior to performing his part of the deal, that he would not be rewarded unless and until he paid any money. The failure of the government to so inform Petitioner that his failure to pay money against the judgment would be deemed a violation of the plea agreement constitutes deceptive and bad faith plea negotiations, and constitutes a breach of the agreement if only by adding terms. This is especially the case as the plea agreement did not require any payment at all. If the government breaches the plea by changing the conditions, or manipulating them to their advantage only, Petitioner is entitled to relief.

Several circuit courts of appeal have considered similar situations, wherein defendants have provided assistance, pursuant to a plea agreement, yet went unrewarded. In each situation, a sanction or relief was awarded. *See e.g.*, ***United States v. Melton***, supra, the defendant entered a guilty plea based upon a proposal from the government, and an agreement that it would recommend departure if the defendant provided full and complete debriefing and substantial assistance. The defendant did all that was required of him, yet at sentencing failed to receive the government's motion for downward departure. In vacating the sentence, the Fifth Circuit stated that it was clear "that the government may neither misrepresent its intentions or renege on representations reasonably relied and acted upon by defendants and their counsel in instances such as is here presented. ... If Roger, in reliance on the

letter, accepted the government's offer and did his part, or stood ready to perform but was unable to do so because the government had no further need or opted not use him, the government is obliged to move for a downward departure. ***Melton***, 930 F.2d at 1098-99 (emphasis supplied).

In Petitioner's case, he fully performed as required by the agreements entered into. He pleaded guilty, acquiesced to a money judgment against him, was fully debriefed, and complied with all other requirements of the plea agreement. He was permitted to render substantial assistance in a limited fashion, and then did so. The government's position in not considering the assistance rendered by Petitioner until he paid against the judgment was a breach of the plea agreement. *See* ***United States v. Canada***, 960 F.2d 263, 269 (1st Cir. 1992) ("While it can be argued that the government stopped short of explicitly repudiating the agreement, Santobello prohibits not only "explicit repudiation of the government's assurances, but must in the interest of fairness be read to forbid end-runs around them"); ***United States v. Knight***, 968 F.2d 1483 (2nd Cir. 1992) ("Not only would it be unfair for the government to rely upon such known, pre-agreement circumstances as reasons for not moving, it would have been fraudulent to have induced a defendant's plea with a promise that the government already knew it was not going to keep").

A presumption of fairness underlies an agreement between the defendant and the government, so that

when the government makes promise and obtains in return cooperation from the defendant, the promise must be kept. ***Santobello***, 404 U.S. at 261-62, 92 S.Ct. at 498. The government's actions in regard to this case fly in the face of such a "presumption of fairness". In spite of the knowledge surrounding Petitioner's financial situation, the government used the pretense of an ongoing investigation into Petitioner's alleged cache of unreported funds to keep putting off making any move as to rewarding Petitioner for his cooperation. All along, continuing to accept whatever information Petitioner kept providing.

Even if, according to the facts of this case, the terms in the pre-plea letters, regarding future cooperation, are not deemed as being a part of the plea agreement, the actions of the government established the formation of a new cooperation agreement was formed after sentencing. First, the government left open the possibility for future cooperation. Next Petitioner provided cooperation to the government after sentencing. Finally, the government authorized, accepted, and used the cooperation from Petitioner. Given that Rule 35 contemplates post-sentencing cooperation, the facts of this case demonstrate the existence of either an Implied Contract or a Quasi-Contract, as to the cooperation provided.

To not hold the government responsible, under the "implied" and/or "quasi" contract principles, always places the government in a "win-win" situation, in that it can reap the benefits from the information provided

by the defendant, then totally dismiss its *quid pro quo* responsibility simply by saying no explicit agreement existed. As observed by the Supreme Court in ***Mabry v. Johnson***, 467 U.S. 504, 509, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984), the constitutional concerns underlying the defendant's "contract" rights in a plea agreement demand broader and more vigorous protection than that accorded to private contractual commitments.

Given the clear existence of a cooperation agreement, even if not considered to be a part of the plea agreement, relief was still available to Petitioner pursuant to ***Wade v. United States***, 504 U.S. 181, 112 S.Ct. 1840, 118 L.Ed.2d. 524 (1992), which provides two bases for relief on cooperation agreements, to wit: if the refusal was based on an unconstitutional motive, or was not rationally related to any legitimate government interest. See ***Wade***, 504 U.S. at 185-86, 112 S.Ct. at 1843-44.

Discrimination based upon an inability to pay violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; poverty, like race and religion, is a suspect class. See ***Williams v. Illinois***, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) (sentencing court cannot constitutionally enhance the jail sentence of an indigent person beyond the statutory maximum because he cannot pay a fine); ***Tate v. Short***, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971) (state cannot convert a fine imposed under a fine-only statute into a jail term because a defendant

cannot pay); ***Bearden v. Georgia***, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)(court cannot revoke probation for failure to pay a fine unless it finds that the probationer wilfully refused to pay or that bona fide efforts to acquire financial resources were not made).

Petitioner submits that, as the government refused to consider his eligibility for a Rule 35(b) motion because of his inability to pay money against the forfeiture judgment, he was wrongfully discriminated against, in violation of the Equal Protection Clause of the United States Constitution. As set out above, the government's actions, coupled with the language in the pre-plea letters, established the existence of a cooperation agreement. Also, given the government's reason for not filing a Rule 35 motion was, at least up until the time of the Evidentiary Hearing, based on Petitioner's failure to pay on the judgment, this established a constitutionally impermissible motivation -- financial status. As such, an order compelling the government to file a Rule 35(b) motion is warranted under the first prong set out in ***Wade***.

Petitioner also submits that the second prong of ***Wade*** has been satisfied, as the government's refusal to file was not rationally related to any legitimate goal. At first, it may appear that the receipt of illegally obtained funds by the government could be classified as a legitimate goal. However, given the facts and circumstances such a goal is not demonstrated. First, pursuant to the investigation, and as was known at the time of the plea agreement, Petitioner had no access to

the assets alleged by the government. Next, as the government admitted, Petitioner was never under any obligation to pay on the judgment. Finally, as to the issue of Petitioner paying for the information, as the government was made aware, the funds for such information were not under the control of Petitioner, but were borrowed. As such, there was no legitimate doubt as to the reliability of Petitioner's financial disclosures.

Again, it was the government that approached Petitioner for the cooperation. as such, there was an implied contract created whereby Petitioner would cooperate in return for Rule 35 consideration. There were no restrictions given as to how Petitioner was to get the information for the cooperation. If the government became unhappy with the manner in which Petitioner was acquiring his information, there should have been some notice. Instead, the government received the requested information, reaped the benefits of such information (i.e. seizure of 450 million dollars), and continued to use the guise of further investigating Petitioner's financial status as a basis for denying Petitioner his Rule 35 relief. As set out above, such actions do not relate to any legitimate government interest.

Additionally, the more important governmental interest rests in encouraging the cooperation in order to prosecute additional crimes. By the "stringing along" of Petitioner, the government did just that. In fact, the government requested that Petitioner assist the Swiss

authorities in a worldwide investigation in return for consideration for such cooperation. Petitioner provided the information in February of 1995, which presumably was one year after the government had learned about the use of the borrowed money to pay for the secretary and investigator. As Petitioner had informed the U.S. Marshal Service as to how he was to gather information (i.e., use of investigator), and Petitioner's information resulted in the capture of 12 fugitives, the refusal to give Petitioner his benefit of the bargain was not based on a legitimate governmental interest, based on the facts and circumstances of this case. The Government knew up front that Petitioner was providing cooperation to the Government under the belief and expectation that he was going to receive a reduction of sentence through a Rule 35(b), continuously throughout two years requesting, taking and benefitting from the Petitioner's cooperation, and then denying to file the Petitioner's Rule 35(b) certainly is a clear fraudulent conduct from the Government and which is also a clear violation of ***Wade***'s second prong. About $450 million were seized through Petitioner's cooperation to the Government and Swiss authorities.

Furthermore, it seems sort of a double standard for the government to suggest that it was inappropriate for Petitioner to pay for the acquisition of information, where the government, through getting cooperation from criminals, is allowed to offer leniency, dismiss charges, and even pay money to said criminals in return

for their information.[1] As such, it seems that there was no rational and legitimate basis for which to deny the filing of the Rule 35 Motion.

As to the Eleventh Circuit's denial being based on the Motion to Compel not being filed until some two years after the extension of the Rule 35 time limits had expired, Petitioner respectfully asserts that the supervisory powers of the court provide authority to raise, *sua sponte*, matters which may affect the rights of criminal defendants. See ***United States v. Delgado-Cardenas***, 974 F.2d 123, 126 (9th Cir. 1992) (citation omitted). As such, and given that the nature of Appellant's Motion raised constitutional issues and, thereby, Appellant's rights, the district court properly considered the motion.

Furthermore, in ***United States v. McDowell***, 117 F.3d 974 (7th Cir. 1997), the Seventh Circuit stated that "[i]t is therefore difficult to conceive of a regime under which it would be the responsibility of the parties to monitor the government's compliance with Rule 35(b)." ***McDowell***, 117 F.3d at 979-80. Petitioner suggests that the facts and circumstances surrounding

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[1] Such practices have raised a concern over whether the government has violated 18 U.S.C. §201(c)(2), by offering "something of value" in return for testimony. *See* ***United States v. Singleton***, 144 F.3d 1343 (10th Cir. 1998), vacated pending *en banc* review, ***United States v. Singleton***, __ F.3d __, 1998 U.S. App. LEXIS 15451 (10th Cir. 1998).

the government's actions in this case create such a regime.

Here, the government clearly accepted the cooperation that Petitioner was furnishing. In fact, in some instances, the government made contact with Petitioner to provide additional information. Through the letters from the government to Petitioner's counsel, there was pervasive use of the term "not at this time" in the government's explanation for not filing the Rule 35 motion. This had the affect of giving the government the opportunity to keep "putting off" filing, while sustaining Petitioner's reasonable belief that the motion would be filed in the future, when cooperation had totally ceased. The government's action in stretching this matter out, along with the claimed impermissible reasons for not filing the motion, present valid issues for the district court to address, thus making the motion proper for review.

Finally, Petitioner respectfully asserts that the Eleventh Circuit's suggestion that there should be no benefit for his cooperation because he received a sentence of 168 months for the offense of conviction flies in the face of the purposes behind offering cooperation. This was a case where Petitioner received some form of leniency from the court. Much to the contrary, the sentence was the result of Congressionally mandated changes in the sentencing guidelines, which were set out to punish offenders like Petitioner. Said changes were also decided to be applied retroactively, thereby creating an entitlement to said changes.

The Eleventh Circuit's position appears to be that, once a defendant is afforded a proper sentence calculation under the prevailing guidelines, no further reduction is required no matter the extent of the cooperation provided. This works a serious injustice to those providing cooperation by not only defeating the purpose of offering the cooperation (i.e., consideration for sentence reduction), but reinforcing the perception that reductions for cooperation are decided in a arbitrary and capricious manner.

CONCLUSION

Petitioner hereby respectfully moves this Honorable Court to approve his application for certiorari for the following reasons.

As the entire negotiations surrounding the plea did not foreclose the future consideration of Petitioner's cooperation, and given the government's actions in accepting, and in some instances, soliciting the cooperation, the cooperation related back to the original plea agreement. As such, the Eleventh Circuit's failure to hold the government to its part of the bargain was contrary to ***Santobello v. New York***, *supra*.

If not considered as part of the original plea, there still existed an enforceable cooperation agreement, given that the actions of the government created either an implied or quasi contract in relation to the cooperation. As such, the government's refusal was

subjected to standards set out in ***Wade v. United States***, *supra*. Petitioner asserts that, because the facts and circumstances the of this case show that the refusal was constitutionally impermissible and/or no way related to legitimate government purpose, that the Eleventh Circuit erred in holding the government to its requirements under the contract.

Finally, the fact that Petitioner received a sentence under the appropriate application of the laws of the United States was wrongly used as a factor for denying Petitioner the benefits of the cooperation agreement.

As such, Petitioner, based on the facts and circumstances surrounding this case, should have this case remanded back to the district court for determination of a sentence reduction for his substantial assistance to governmental authorities, which he is entitled to under the policies and practices surrounding cooperation agreements.

Respectfully submitted,

Cloud H. Miller, III
Attorney for Petitioner
115 East 8th Street
Chuluota, FL 32766
(407) 366-2545 (Office)
(407) 359-7445 (Fax)

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-5388

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PAUL LIR ALEXANDER, a.k.a
Pedro Jose Chamorro, a.k.a.
Oscar Eugenio Arguello, a.k.a
Paul Oscar Galbraith, a.k.a.
Jose Paulo Ferreira,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Florida

(August 18, 1998)

Before BLACK, CARNES, and HULL, Circuit Judges.

PER CURIAM.

We affirm for two reasons the district court's order denying Alexander's motion to compel the government to file a Rule 35 motion. First, given the belated nature of the motion to compel, the Rule 35 motion Alexander sought to require would have been outside the time provided for such motions under subsection (b) of the rule. It is not error for a district court to refuse to order the government to file a motion which would be untimely under Rule 35(b).

Second, even if the sought after Rule 35 motion would have been timely, the district court properly declined to require the government to file such a motion. We agree with the district court's decision in that respect for essentially those reasons set out by the court on pages 100 - 108 of volume 4 of the record.

To the district court's discussion, we add three observations of our own. First, a defendant who cooperates with the government in the hope or expectation that he will receive a Rule 35 motion in return, after entering into a plea bargain agreement which fails to explicitly provide for such a motion, is only entitled to what the agreement promises in that respect: nothing. Second, given the use to which Alexander put his funds after agreeing to a $5 million dollar forfeiture, his arguments based upon indigency may entitle him to an award for audacity, but they do not entitle him to any relief. Third, given that Alexander imported into this country 1,845 kilos of cocaine while ostensibly working as a confidential informant for the DEA, he was extremely fortunate to receive a sentence of only 168 months in prison, regardless of any cooperation he rendered in the futile hope that he could receive an even more lenient sentence.

AFFIRMED.

App. 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-208-CR-MOORE

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORDER

PAUL LIR ALEXANDER,

Defendant.
_____/

THIS MATTER came before the Court for hearing on August 4, 1997, on Defendant's Motion to Compel the Government to File a Rule 35(b) Motion.

The court having reviewed the above motion and responses thereto, and having heard testimony of the witnesses and argument of counsel, it is

ORDERED AND ADJUDGED that the defendant's motion is hereby DENIED.

DONE AND ORDERED in Miami, Florida, this 7th day of August, 1997.

/s/ K M Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:

Alex Angueira, AUSA
Jay Moskowitz, Esq.
Peter Raben, Esq.

App. 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

v.

PAUL LIR ALEXANDER
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 93-20027-01

William M. Norris, Esq.
Defendant's Attorney

THE DEFENDANT:
(xx) pleaded guilty to count(s) One
( ) was found guilty on count(s) _____
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title/Sect	*Nature of Offense*	*Date Offense Concluded*	*Count Number(s)*
21 : 963	*Conspiracy to import cocaine*	*Dec. 1992*	*One*

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐The defendant has been found not guilty on count(s) ___ and is discharged as to such count(s).

☐Count(s) _____ (are) dismissed on the motion of the United States.

☐It is ordered that the defendant shall pay a special assessment of $50, for count(s) One, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 593-38-6156

Defendant's Date of Birth: 07-27-56

October 13, 1993
Date of Imposition of Sentence

Defendant's Mailing Address:

IN CUSTODY

Signature of Judicial Officer
Hon. K. Michael Moore
United States District Judge
Name & Title of Judicial Officer

Defendant's Residence Address:

March 11, 1994
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Two Hundred & Sixty-two (262) months.

The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at _____ a.m./p.m. on _____.

[ ] As notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2:00 p.m. on _____.

[ ] As notified by the United States Marshal.

[ ] As notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By:_____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

( ) The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

( ) The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

( ) The defendant shall not possess a firearm or destructive device.

If the Defendant is deported, he is not to re-enter the United States without the permission of the Attorney General. The term of supervised release shall be non-reporting if the Defendant resides outside the United States.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $1,000,000. The fine includes any costs of incarceration and/or supervision. Said fine is payable to the United States of America.

[x] This amount is the total of the fines imposed on individual counts, as follows: Count One.

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

The fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA
Plaintiff,

v.

PAUL LIR ALEXANDER
Defendant.

Case93-208-CR-KMM
MIAMI, FLORIDA
AUGUST 4, 1997
9:15 A.M.

EXCERPT OF THE PROCEEDINGS
TRANSCRIPT OF MOTION TO COMPEL
BEFORE THE HONORABLE K. MICHAEL MOORE,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF — ALEX ANGUEIRA, A.U.S.A.
PAUL PELLETIER, A.U.S.A.

FOR THE DEFENDANT — JAY MOSKOWITZ, ESQ.
PETER RABEN, ESQ.

REPORTED BY: BRENDA M. ALEXANDER, R.P.R.
Official United States Court Reporter
Federal Justice Building, Room 1168
99 N.E. 4th Street
Miami, Florida 33132 305/530-0880

STENOGRAPHICALLY REPORTED COMPUTERIZED
TRANSCRIPTION.

Q. Do you know where the money was going to come from?
A. It wasn't Mr. Alexander's money.
Q. It was --
A. It was not Mr. Alexander's money.
Q. Where was he going to get the money, if you know?
A. He told me that he would borrow it.

MR. MOSKOWITZ: That's all.

THE COURT: There was some question in my mind before the hearing that I thought a hearing would help address, and it has.

Let me just tell you my findings and conclusions.

MR. MOSKOWITZ: Before you do, your Honor, I was going to call Mr. Norris. Do you want me to proffer what he has to say?

THE COURT: It's really not necessary. Thank you.

It's clear to me from a reading of the plea agreement, and it's been very helpful the way in which you have organized your exhibits, and that plea agreement is Exhibit 11, that there is nothing in the plea agreement which calls for cooperation.

There are two other aspects of the plea agreement that are noteworthy for this issue. That is contrary to the Government's position, I do not conclude that the reference in paragraph 1 of the plea agreement calls for

the payment of $5 million. If it does, then the Government in the future should be more explicit in terms of what it's attempting to achieve in its plea agreements.

All this says is that he agrees to plead guilty to the criminal forfeiture of $5 million pursuant to 21 U.S.C., Section 853.

Without more, I do not interpret that and I don't think you can fairly interpret that as an obligation to pay.

The other aspect of the plea agreement that I do think is important is paragraph 11 which reads, This is entire agreement and understanding between the United States and the defendant. There are no other agreements or understandings between the parties.

It is, in my judgment, critically important, that we enforce this language. We have it in there for a very specific reason. It's the way we do business here. I'll go to the plea colloquy itself where we ask questions that touch on this.

As practicing attorneys in this district, all of us, know the importance of this paragraph, the phraseology and why we put it in there, so that we can eliminate the very type of hearing that we're having today and that we have expended a considerable amount of time on in the briefs.

The letters dated -- let me go to the plea colloquy itself before I go to the letters. That's contained at Exhibit 5. We do these plea colloquies ad nauseam, and there are reasons for each one of the questions that we ask.

At page 4 of the transcript, line 3: The Court asks the defendant, Are the terms contained in the plea agreement, are those the terms of the plea agreement with the government as you understand them? The defendant, Yes, I do understand them.

Now, that really is an opportunity for someone to address the Court that either these are the terms of the plea agreement with the Government, as he understands them, or they're not or there are other terms. I think the Court is entitled to rely on the very unequivocal answer of yes, I do understand them.

Now, having said that, we go to the end of the plea colloquy at page 10, line 12, from Mr. Raben: If the Court please, the Court did not go over paragraph by paragraph the plea agreement, which is not a problem at all. I just want the Court to be aware that although paragraph 11 says is that this is the entire agreement, and understanding between the United States and defendant, there have been certain agreements between the United States and the defendant through letters.

Let me, again, this is Mr. Raben speaking, but I think this kind of issue can be eliminated if those agreements if, in fact, they are agreements, that they are made part of the single document that constitutes the plea agreement.

This practice of, if you say it's a practice -- and I don't know if it is or isn't -- I must tell you at least based on my experience it's not the practice to have these side agreements.

I'm not saying that they can't have letter exchanges, but to suggest that they constitute agreements undermines the very purpose of having a plea agreement.

To continue, "They do not concern any promises as would effect the voluntariness of the plea at all, just that the United States has agreed to take some positions or recommendations which I wanted the Court to know had some kind of impact on my client determining to take the plea.

I think it's certainly appropriate that if it wasn't taken up at the time the question was asked of the defendant that Mr. Raben was bringing it to the Court at least during the course of the hearing. But he notes that they would not effect the voluntariness of the plea at all.

Then he goes on to cite, for example, "The United States has agreed they would not be charging his wife for certain crimes. The United States has agreed they would

not be charging him with any other criminal conduct as part of the scenario that they are aware of at the time of sentencing unless it includes crimes of violence. I just wanted to let the Court know."

So he has identified two specific promises from the Government effecting the plea. The Court follows up on it. Is there any reason why it isn't in here?

Mr. Angueira responds, basically, Judge, these were just discussions. Immediately now we're at level of whether these are promises or discussions. Just discussions that Mr. Raben and I had, and the Government has every full intent not to pursue matters. They were just not just contained in the plea agreement because it did not, I think the Government has met the res gestae defense.

The Court, Again, here is what the Court is concerned about. Is it an inducement to him entering a plea? In front of me at this point are the two inducements; one, that he not be charged with any further crimes that has been articulated on the record, and one that his wife not be charged.

Mr. Angueira, Again, I think it is more in the nature of discussions. I can't say it is an inducement or not. Mr. Raben, I think it was a big factor in had my client's determination the assurance that the Government

agree not to bring in his wife. No mention of cooperation at this point.

The Court, That's one. The Government has promised not to charge his wife. Any other? We're trying to make the kind of detailed inquiry that is necessary to accept a plea.

Mr. Raben, I don't have the letters in front of me. Nothing that comes to mind other than that, the promise not to charge him with any other crimes, other than crimes of violence. I don't recall if there were any organization --

The Court, Is there any reason why we can't ask him if there are any other promises that caused him? I mean, I'm only doing this for your benefit. To hold the Government, how about asking how about if there are any other promises other than the plea agreement that caused him to enter a plea, get it on the record. I mean that protects you in case the Government, not that they would ever want to do that, but if they wanted to reneg?

Mr. Raben, No, other than the letters from the Government, there are know other promises, your Honor.

The Court, I don't know what they are without asking him. I mean is there any reason why he can't?

Mr. Raben, No, no at all.

The Court, Let's ask him.

Mr. Raben, I don't need to put them on the record.

The Court, I want to make sure that he's protected and you're protected in case the Government renegs on anything.

Mr. Raben, as far as I'm concerned by my stating for the record that as part of Mr. Alexander's considerations in accepting this plea were the promises, recommendations, assurances, positions that the Government said they would take in the course of this. That's fine. We could cite for the record, I think letters are dated June 7 and June 9, 1993, so I don't need him on the record.

The Court: All right. OK.

Mr. Raben, Thank you.

The Court, All right.

Hearing concluded and foregoing proceedings were had at sidebar out of the hearing of the jury. I don't think there was any jury.

It's clear to me at least by the great weight of the evidence that we are entitled to rely on the plea colloquy to draw out any of those inducements to the plea. When the defendant was asked, he cited no other inducements other than what was contained in the plea agreement.

When his attorney raised it, near the end of the hearing, identified the two other inducements, there was no

reference to cooperation. So I think Court is entitled to rely that that, in fact, was not an inducement to the entering of a plea.

Now, even were I to go to the letters dated June 7 and June 9, Exhibits Number 1 and 3, I do not find that you could fairly conclude that these letters establish that a cooperation agreement was contemplated by the Government.

I think I see fairly that the defendant was desirous of cooperation. And in fact, did cooperate, not pursuant to a cooperation agreement, but was desirous of cooperating with the Government.

The problem is that the Government was equally clear in its responses that it was not going to enter into that type of an agreement absent certain circumstances being met, which there's no evidence in the record that, at least that they were satisfied that those conditions were met. And certainly, there was no evidence that they reduced the cooperation agreement to a written document.

Indeed, I think the careful reading of the letters are to the contrary in rejecting cooperation and leaving only the remote possibility of cooperation in the future.

I'm not going to reach each of these letters in terms of the precise verbiage that was used to reject the notion that there was a plea agreement in place.

Obviously, those letters would only become relevant if, in fact, there was a question as to whether the plea agreement required cooperation or whether there was some other agreement at some point in the future establishing the existence of a cooperation agreement.

With respect to the payment of the $5 million, the parties if not in this case, certainly in other cases, can contract that to forfeit amounts of money in return for assurances from the Government that they would file a cooperation agreement or a Rule 5K.1 motion. In this case, I don't find that the parties have done that.

The Government has not done it by way of a plea agreement or cooperation agreement. It has insisted on, in exchange for any post-plea cooperation agreement, it's free to enter into those agreements if it so chooses, but it can't be found liable for having breached something that it never entered into. That's regardless of whether the defendant has the ability to pay or not.

If the defendant has the ability to do that or something else, then that's always a possibility in every case that they can continue to negotiate further cooperation agreements.

Based on the record and testimony I've heard, the motion to compel the filing of Rule 35 motion by the Government filed by the defendant is denied.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5388
Non-Argument Calendar

District Court Docket No. 93-208-CR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PAUL LIR ALEXANDER, a.k.a
Pedro Jose Chamorro, a.k.a.
Oscar Eugenio Arguello, a.k.a
Paul Oscar Galbraith, a.k.a.
Jose Paulo Ferreira,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Florida

Before BLACK, CARNES, and HULL, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the **order** of the

District Court appealed from in this cause be and the same is hereby **AFFIRMED**.

Entered: August 18, 1998
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: Sep. 16, 1998